

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Chief Bankruptcy Judge

Sacramento, California

January 14, 2014 at 1:30 p.m.

**NOTICE: THE ITEMS ON THIS CALENDAR HAVE BEEN REORDERED TO
PRIORITIZE TENTATIVE RULINGS. YOUR ITEM NUMBER HERE MAY NOT
MATCH YOUR EXPECTED ITEM NUMBER.**

1. [13-32432](#)-C-13 JEFFREY/RACHELLE FILER MOTION FOR RELIEF FROM
RTD-1 Dale A. Orthner AUTOMATIC STAY
12-11-13 [[62](#)]
SCHOOLS FINANCIAL CREDIT
UNION VS.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on December 11, 2013. 28 days' notice is required. This requirement was met.

Tentative Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor, having filed an opposition, the court will address the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to continue the hearing to February 14, 2014. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law: :

Lessor, Schools First Credit Union seeks relief from the automatic stay with respect to an asset identified as a 2006 Honda Odyssey Minivan, VIN # ending in 2490. The moving party has provided the Declaration of Kevin Benner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Benner Declaration, dated December 10, 2013 states that the Debtor

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is in default for monthly payments due September 25, 2013, through December 2013. The September 25, 2013 amount due is \$374.44 and the amount due for October through December 2013 in the full monthly payment of \$381.48 each in the amount of \$381.48. As of November 19, 2013, Debtor is delinquent two (2) pre-petition payments and 2 (two) post-petition payments.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$20,511.76. Pursuant to order of the court (Dkt. 76) the value of the vehicle is set at \$11,800.00.

Debtor's Opposition (filed 12/23/13, Dkt. 77)

Debtors oppose the Motion. Following the court's order on the Motion to Value the secured claim of Schools First, Debtors filed and served a Second Amended Chapter 13 Plan and Motion to Confirm. This plan lists Movant as a Class 2 Creditor and proposes increasing the plan payment from the initial \$187.00 per month to \$319.80 per month. The hearing on the Motion to confirm is set for February 4, 2014.

By the end of January 2014, Debtors intend to have paid the difference between the Second Amended Plan and the plan initially filed with the court, to make up for lower payments made in October and November 2013. Debtors have paid the pre-petition arrears on the vehicle and the loan payments owed to Movant are current as of the date of filing the petition, September 24, 2013.

Chapter 13 Trustee (filed 12/27/13)

On December 27, 2013, the Chapter 13 Trustee filed a statement of non-opposition to Movant's Motion for Relief.

Creditor's Response (filed 01/16/13, Dkt. 90)

Creditor does not agree that it has received adequate protection and does not believe the vehicle is necessary for an effective reorganization or that there is a reasonable likelihood that Debtors will be able to reorganize.

Creditor argues the following:

1. There is no equity in the vehicle. Creditors proof of claim, filed October 11, 2013 and amended December 6, 2013, claims a debt due of \$20,570.57. At a hearing on December 17, 2013, the court determining the value of the collateral to be \$11,800.00.
2. The value of the vehicle is rapidly depreciating. Debtor averages 18,428 miles per year driving the vehicle.
3. Debtors originally listed Creditors claim in Class 4 of the plan, but did not make any contract payments. Debtor later filed a second Amended Plan, but has yet to make any post-petition adequate protection payments. Debtors intend to commence making payments afer the plan confirmation hearing in February 14.
4. The proposed plan payment is not sufficient to pay the proposed dividend of \$222.68 per month to Creditor. After accounting for Trustee fees, administrative fees, and a Class to PMSI, there are insufficient funds to meet the payment due to Creditor. The

terms of the second amended plan mean that Creditor will not receive the sum of \$222.68 until the 31st month of the plan, after the PMSI claim and administrative claims are paid.

5. Debtors have not adequately protected the interest of Creditor because registration fees and smog inspection are due in addition to regular plan payments and the arrears on the plan payment. Debtors have not explained why these sums were not previously paid and how they will be able to make payment in January.
6. The vehicle is not necessary for reorganization because it is not used to generate income. Creditor argues that Debtors should use public transportation and consider purchasing a vehicle that receives better gas mileage.
7. Debtors are not licensed to operate as a moving company and Debtors have not filed a detailed list of their business income and expenses. Parties in interest are unable to determine whether the plan is feasible.

Discussion

Creditor seeks relief from the automatic stay under 11 U.S.C. §§ 361(d)(1) and (d)(2). Pursuant to § 362(d)(1), a creditor may be granted relief from stay for cause, including lack of adequate protection. The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Since the filing of Creditors Motion for Relief, Debtors have proposed a Second Amended Plan and state that they have cured pre-petition amounts owed, bringing their payments due to Creditor current to the petition date. Creditors main argument concerning adequate protection are better presented at the hearing on the Motion to Confirm the Second Amended Plan, as they are objection to plan terms.

In their Declaration (Dkt. 78), Debtors state that they have made the October and November plan payments and recently sent funds to the Trustee for the December payment in the amount due under the Second Amended Plan. Debtors declare that they have maintained the vehicle in usable form and continue to use the vehicle for themselves and their children, as it is their only means of transportation. Debtors invested \$1,200 in repairs to the vehicle over the last four months, including new tires, brake repair, oil change, battery replacement, and new spark plugs. Debtors further declare they have maintained the required registration on the vehicle and will renew the registration prior to expiration.

The court recognizes that Debtors are taking adequate steps to practically protect the vehicle, itself. The court is concerned about Debtors history of not providing Creditor with payments, pursuant to its previous Class 4 classification; however, Debtors have presented the court with a second Amended Plan, adjusting the treatment of Creditor. Creditors adequate protection arguments are effectively objections to confirmation under the terms of the Second Amended Plan and are better heard at the hearing on plan confirmation.

Pursuant to § 362(d)(2), a creditor may be granted relief from stay if Debtor lacks equity in the property and if the property is not necessary to an effective reorganization. While the property here is lacking in equity, the court is not convinced it is unnecessary for an effective reorganization. Debtors are a married couple with three children and the subject vehicle is the family's only means of transportation. Creditor cavalierly argues that Debtors can simply use public transportation and that Debtor should obtain a more gas efficient vehicle. The court is not convinced that a family of five are better supported using public transportation and does not agree that a new extension of credit to obtain a more "gas efficient" vehicle is in the best interests of Debtors.

Creditors original Motion for Relief from the Automatic stay was filed under the premise of Debtors previous plan. Debtors have since filed a new plan and now Creditor submits a response to Debtors opposition that effectively operates as an opposition to confirmation. Many of Creditors concerns are better heard at the hearing on Debtors Motion to Confirm the Second Amended Plan.

The court's decision is to continue Creditor's Motion for Relief from the Automatic Stay to February 4, 2014, to be heard concurrently with Debtor's plan confirmation hearing.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are
stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the hearing on Creditor's
Motion for Relief is continued to February 4,
2014 at 2:00 p.m.

2. [13-32432](#)-C-13 JEFFREY/RACHELLE FILER
ABG-1 Dale A. Orthner
Thru #2

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
11-21-13 [[47](#)]

KINECTA FEDERAL CREDIT UNION
VS.

Local Rule 9014-1(f) (1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on November 21, 2013. 28 days' notice is required. This requirement was met.

Final Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The court's decision is to grant the Motion for Relief from the Automatic Stay. No appearance is required. The court makes the following findings of fact and conclusions of law:

Lessor, Kinecta Federal Credit Union, seeks relief from the automatic stay with respect to an asset identified as a 2010 Toyota Tundra Truck, VIN # ending in 6294. The moving party has provided the Declaration of Marshaun Logan-Larry to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Logan-Larry Declaration, dated November 21, 2013 states that the Debtor is in default for monthly payments due July 2013, though October 2013, each in the amount of \$573.22. As of November 19, 2013, Debtor is delinquent two (2) pre-petition payments and 2 (two) post-petition payments.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$30,351.63. Debtor's statement of intent indicates an intent to surrender the subject property to Movant.

The Chapter 13 Trustee filed a statement of non-opposition.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d) (1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue a minute order terminating and vacating the automatic stay to allow Kinecta Federal Credit Union to proceed under applicable nonbankruptcy laws to enforce its remedies and repossess with regard to the subject asset.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. §362(a) are vacated to allow Kinecta Federal Credit Union to pursue nonbankruptcy remedies with regard to the property commonly known as 2010 Toyota Tundra, Vin #6294.
